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Overview of the Judgments

About the calculation of costs related to water services under the Water Framework Directive

Judgment of the Court (Sixth Chamber) of 7 December 2016 in Case C-686/15 – *Vodoopskrba i odvodnja d.o.o.*

Subject Matter

This request for a preliminary ruling concerns the interpretation of Directive 2000/60/EC establishing a framework for Community action in the field of water policy (Water Framework Directive). The request has been made in proceedings between Vodoopskrba i odvodnja d.o.o. and Ms Željka Klafurić concerning the latter's refusal to pay the fixed component included in the price of her water consumption. The Municipal Court of Velika Gorica, Croatia, asked, in essence, whether the Water Framework Directive must be interpreted as precluding national legislation which provides that the price of water services invoiced to a consumer is to include not only a variable component calculated

* Judgements and orders not published in ECR have been included in this report only if considered of particular interest for the development of EU environmental law.

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according to the volume of water actually consumed by the person concerned, but also a fixed component covering the charges for the connection of buildings to the water supply works and, in particular, the costs inherent in their upkeep, reading the meter, processing the data obtained, calibration and upkeep of the meters and the analysis of the drinking water and maintenance of its cleanliness.

Key findings

20 In that perspective, Article 9 of Directive 2000/60 provides that the Member States are to take account of the principle of recovery of the costs of water services, including environmental and resource costs, having regard to the economic analysis conducted in accordance with Annex III, and in accordance, in particular, with the polluter-pays principle. Member States must ensure, inter alia, that water-pricing policies provide adequate incentives for users to use water resources efficiently and thereby contribute to the environmental objectives of Directive 2000/60.

24 In that regard, it does not follow either from Article 9 of Directive 2000/60 nor from any of the other provisions thereof that the EU legislature intended to preclude the Member States adopting a water-pricing policy which is based on a price for water charged to users including a variable component connected with the volume of water actually consumed and a fixed component not connected therewith.

ETS greenhouse emission allowances fall under the concept of 'similar rights' under the VAT Directive

Judgment of the Court (Second Chamber) of 8 December 2016 in Case C-453/15 – *A, B*

Subject Matter

This preliminary reference procedure concerns the interpretation of Article 56(1)(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (VAT Directive), stemming from a criminal proceedings against A and B for being accessories to tax evasion. A and B, who work for a tax advice firm, were convicted by the Landgericht Hamburg (Regional Court, Hamburg, Germany) and fined for being accessories to tax evasion in a case concerning a value added tax (VAT) evasion scheme run by another defendant, G, from April 2009 to March 2010, which was aimed at evading VAT on trading in greenhouse gas emission allowances. The Federal Court of

Justice hearing their appeal wanted to know in essence whether Article 56(1)(a) of the VAT Directive must be interpreted as meaning that the 'similar rights' mentioned in that provision include the greenhouse gas emission allowances defined in Article 3(a) of Directive 2003/87.

Key findings

24 It should be recalled here that the purpose of the provisions of the VAT Directive determining the place where supplies of services are taxed is to avoid, first, conflicts of jurisdiction which may result in double taxation, and, secondly, non-taxation (see, to that effect, judgments of 6 November 2008, Kollektivavtalsstiftelsen TRR Trygghetsrådet, C-291/07, EU:C:2008:609, paragraph 24, and 17 December 2015, WebMindLicenses, C-419/14, EU:C:2015:832, paragraph 41).

25 The Court has previously held, with respect to Article 9 of Sixth Directive 77/388, that the underlying logic of the provisions concerning the place where a service is supplied requires that goods and services are taxed as far as possible at the place of consumption (judgment of 3 September 2009, RCI Europe, C-37/08, EU:C:2009:507, paragraph 39).

26 The inclusion of greenhouse gas emission allowances in the 'similar rights' mentioned in Article 56(1)(a) of the VAT Directive corresponds to that purpose and that logic.

27 First, the transfer of allowances has to be entered in the register provided for in Article 19 of Directive 2003/87, the identity of the transferee, the place where he has established his business or has a fixed establishment for which the transfer is effected, or the place where he has his permanent address or usually resides, and consequently also the country of destination of the transfer can be determined easily and with great certainty.

28 Secondly, since the allowances transferred must in principle be used at the place where the transferee carries on his business, determining that place as the place where the service consisting in a transfer of allowances is supplied for tax purposes allows the supply to be taxed under the VAT rules of the Member State in which the allowances are used.

29 In addition, it should be observed that, as the Advocate General states in point 84 of his Opinion, that was the solution chosen by the great majority of Member States before, first, the transposition of Council Directive 2008/8/EC of 12 February 2008 amending the VAT Directive as regards the place of supply of services (OJ 2008 L 44, p. 11), which from 1 January 2010, for supplies of services to taxable persons, laid down the general rule that the place of supply is the place where the recipient is established, and,

secondly, the transposition of Council Directive 2010/23/EU of 16 March 2010 amending the VAT Directive as regards an optional and temporary application of the reverse charge mechanism in relation to supplies of certain services susceptible to fraud (OJ 2010 L 72, p. 1), which inserted Article 199a in the VAT Directive, under which the Member States may provide that the person liable for payment of VAT is the taxable person to whom a transfer of greenhouse gas emission allowances within the meaning of Article 3 of Directive 2003/87 is made.

30 In the light of all the foregoing considerations, the answer to the referring court's question is that Article 56(1)(a) of the VAT Directive must be interpreted as meaning that the 'similar rights' mentioned in that provision include the greenhouse gas emission allowances defined in Article 3(a) of Directive 2003/87.

On the inclusion of flights to and from Swiss airports under the ETS Directive

Judgment of the Court (Fourth Chamber) of 21 December 2016 in Case C-272/15 – *Swiss International Air Lines AG*

Subject Matter

This request for a preliminary ruling concerns the validity of Decision No 377/2013/EU derogating temporarily from Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community (ETS Directive) in the light of the general principle of equal treatment. This request has been made in proceedings between Swiss International Air Lines, on the one hand, and the Secretary of State for Energy and Climate Change (United Kingdom) and the Environment Agency (United Kingdom), on the other, based on the fact that Swiss International Air Lines had to surrender greenhouse gas emission allowances in respect of flights to and from Switzerland operated in 2012. The Court of Appeal (England & Wales), in essence, asked the Court to examine the validity of Decision No 377/2013 in the light of the principle of equal treatment, since the temporary derogation provided for by Article 1 of that decision from the requirements imposed by Article 12(2a) and Article 16 of the ETS Directive, with respect to the surrender of greenhouse gas emission allowances for flights operated in 2012 between EU Member States and the majority of third countries, does not apply to, in particular, flights to and from airports situated in Switzerland.

Key findings

26 In accordance with the Court's settled case-law, there is in the FEU Treaty no general principle obliging the Union, in its external relations, to accord in all respects equal treatment to different third countries and traders do not in any event have the right to rely on the existence of such a principle (see, inter alia, judgments of 22 January 1976, Balkan-Import-Export, 55/75, EU:C:1976:8, paragraph 14 ; of 28 October 1982, Faust v Commission, 52/81, EU:C:1982:369, paragraph 25; of 10 March 1998, Germany v Council, C-122/95, EU:C:1998:94, paragraph 56, and of 10 March 1998, T. Port, C-364/95 and C-365/95, EU:C:1998:95, paragraph 76).

37 In the light of all the foregoing, the answer to the first question is that examination of Decision No 377/2013 in the light of the principle of equal treatment has disclosed nothing to affect the validity of that decision, in so far as the temporary derogation provided for in Article 1 of that decision from the requirements laid down in Article 12(2a) and Article 16 of Directive 2003/87, with respect to the surrender of greenhouse gas emission allowances in respect of flights operated in 2012 between EU Member States and most third countries, does not apply to, inter alia, flights to and from airports situated in Switzerland.

On the relationship between the Habitats Directive and the Strategic Environmental Assessment Directive in the context of 'small areas at local level'

Judgment of the Court (Third Chamber) of 21 December 2016 in Cases C-444/15 – *Associazione Italia Nostra Onlus*

Subject Matter

This request for a preliminary ruling concerns the validity of Articles 3(3) of Directive 2001/42/EC on on the assessment of the effects of certain plans and programmes on the environment (SEA Directive) and the interpretation of Article 3(2) and (3) of that directive. The request has been made in proceedings between the Associazione Italia Nostra Onlus, on the one hand, and the Municipality of Venice, Italy, and other Italian public authorities, on the other, concerning the requirement to carry out an environmental assessment under the SEA Directive in the case of a construction project planned for an island in the Venetian Lagoon, located nearby a Natura 2000 site. The Italian Regional Administrative Court for Veneto asked first whether Article 3(3) of the SEA

Directive is valid in the light of the provisions of the TFEU and of the Charter. The national court also wanted to know whether Article 3(3) of the SEA Directive, read in conjunction with recital 10 of that directive, must be interpreted to the effect that the term 'small areas at local level' in paragraph 3 may be defined with reference solely to the size of the area concerned.

Key findings

56 In the light of the foregoing, it must be held that Article 3(3) of Directive 2001/42, by not excluding any plan or programme likely to have significant effects on the environment from an environmental assessment under that directive, falls within the scope of the objective pursued by that directive of providing a high level of environmental protection.

60 Accordingly, it does not appear in the present case that the Parliament and the Council, by adopting Article 3(3) of Directive 2001/42, committed a manifest error of assessment in the light of Article 191 TFEU. Therefore, that provision of Directive 2001/42, in the context of the present case, has revealed nothing which could affect its validity in the light of Article 191 TFEU.

63 Since, as has been established in paragraph 60 above, Article 3(3) of Directive 2001/42 has revealed nothing which could affect its validity in the light of Article 191 TFEU, it follows that that provision also reveals nothing which could affect its validity in the light of Article 37 of the Charter.

67 Since Article 3(3) of Directive 2001/42 does not make any express reference to the law of the Member States for the purpose of determining the meaning and scope of 'small areas at local level', that determination must be made in the light of the context of that provision and the objective of that directive.

70 Thus, as the Advocate General stated in point 56 of her Opinion, it is evident from the similarity of the terms used in the first indent of Article 2(a) and in Article 3(3) of Directive 2001/42, and from the broad logic of the directive that the expression 'local level' has the same meaning for both those provisions, that is to say, it refers to an administrative level within the Member State concerned.

72 As regards the term 'small area', the qualifier 'small', in accordance with its usual meaning in everyday language, refers to the size of the area. Thus, as the Advocate General stated in point 59 of her Opinion, that criterion of the size of the area may be understood only as referring to a purely quantitative factor, that is to say, the size of the area concerned by the plan or programme referred to in Article 3(3) of Directive 2001/42, irrespective of the effects on the environment.

On the duty to disclose information and the exemption on ground of commercial interests and privacy

Judgment of the General Court (Fourth Chamber) of 13 January 2017 in Case T-189/14 – *Deza, a.s.*

Subject Matter and Judgment

This appeal case, which is not available in English, concerns a dispute between Deza, a producer of a chemical substance called DEHP used to soften plastic made of PVC, and the ECHA. The latter had made partially available to two non-governmental organizations the information provided by the former in order to obtain a permit under Regulation (EC) No. 1907/2006. Deza contested this decision based, first, on the principle that under Regulation (EC) No. 1049/2001, on access to information, there should be a general presumption in favor of denying access to documents in order to protect commercial interests. Secondly Deza moved four specific grounds related, in particular, to the protection of commercial interests and (intellectual) property rights, lack of public interest in making the information available, and breach of motivation duty.

The General Court dismissed the action.

On the reporting duties for producers of precipitated calcium carbonate under the ETS Directive

Judgment of the Court (First Chamber) of 19 January 2017 in Case C-460/15 – *Schaefer Kalk GmbH & Co. KG*

Subject Matter

This request for a preliminary ruling concerns the validity of Article 49(1) of Commission Regulation (EU) No 601/2012 on the monitoring and reporting of greenhouse gas emissions pursuant to the ETS Directive and point 10 of Annex IV thereto. The request has been made in proceedings between Schaefer Kalk GmbH & Co. KG Federal Republic of Germany concerning the refusal to allow that company to subtract from the emissions subject to the monitoring obligation the carbon dioxide (CO_2) generated in an installation for the calcination of lime transferred to a precipitated calcium carbonate ('PCC') installation. The national court hearing the case decided to ask, in essence, the Court of Justice to rule on the validity of Article 49(1) of Commission Regulation (EU) No 601/2012 in so far as, by systematically including the CO_2 transferred for the production of PCC in the emissions of a lime combustion installation, regardless of whether or not that CO_2 is released into the atmosphere, those

provisions go beyond the definition of emissions as provided for in Article 3(b) of the ETS Directive.

Key findings

38 It appears from the material before the Court, which has not been disputed, that the CO_2 used for the production of PCC is chemically bound in that stable product. Moreover, the activities of PCC production are not among those which fall within the scope of that directive under Article 2(1) of Directive 2003/87 read in conjunction with Annex I thereto.

39 However, in a situation such as that at issue in the main proceedings, where the CO_2 produced by an installation for the production of lime is transferred to an installation for the production of PCC, it appears, under the second sentence of Article 49(1) of Regulation No 601/2012 and point 10(B) of Annex IV to that regulation, that all of the CO_2 transferred, whether or not part of that CO_2 is released into the atmosphere during its transportation, due to leakages, or even the production process itself, is regarded as having been emitted by the installation for the production of lime in which that CO_2 was produced, although the transfer might not result in any release of CO_2 into the atmosphere. As the Advocate General noted in point 41 of her Opinion, those provisions create an irrebuttable presumption that all the CO_2 transferred has been released into the atmosphere.

40 Those provisions thus lead to the CO_2 transferred in such circumstances being regarded as falling under the definition of 'emissions' within the meaning of Article 3(b) of Directive 2003/87, despite not always being released into the atmosphere. By the second sentence of Article 49(1) of Regulation No 601/2012 and point 10(B) of Annex IV to that regulation, the Commission therefore broadened the scope of that definition.

41 Furthermore, it follows from that presumption that the operators concerned may not, in any circumstances, subtract the amount of CO_2 transferred for the production of PCC from the aggregate emissions of their installations for the production of lime, despite the fact that that CO_2 may not always be released into the atmosphere. Such an impossibility means that the allowances must be surrendered for all of the CO_2 transferred for the production of PCC and may no longer be sold as excess, thus calling into question the allowance trading scheme in circumstances nevertheless consonant with the ultimate objective of Directive 2003/87, which seeks to protect the environment by means of a reduction of greenhouse gas emissions (as regards the aims of Directive 2003/87, see judgment of 16 December 2008, Arcelor Atlantique et Lorraine and Others, C-127/07, EU:C:2008:728, paragraph 31).

42 In adopting those provisions, the Commission therefore amended an essential element of Directive 2003/87.

48 It follows from all the foregoing considerations that the Commission, having altered an essential element of Directive 2003/87 when it adopted the second sentence of Article 49(1) of Regulation No 601/2012 and point 10(B) of Annex IV to that regulation, overstepped the limits laid down in Article 14(1) of that directive.

Editor's Appraisal[1]

The period under scrutiny was relatively quiet and it would have passed basically unnoticed if it was not for two cases. First, Croatia made its first *admissible* preliminary reference concerning environmental matters. The Municipal Court of Gorica had asked the question on whether fix costs related to the distribution of water can be charged to consumers under the Water Framework Directive already in 2014, but back then the Court of Justice had declared itself manifestly incompetent as the case concerned facts occurred prior to Croatia's entry to the European Union.[2] Clearly, the inhabitants of the Municipality of Gorica must be quite irritated by the prices charged by local water distributors for the costs related to, among others, the maintenance of the water distribution network. The judgment in *Vodoopskrba i odvodnja d.o.o.* makes clear that they will have to find a different solution for challenging the invoices of local water distributors as the Court of Justice clarified that Article 9 of the Water Framework Directive does not preclude charging consumers for the fix costs related to water distribution services, regardless of how irritating these costs might be.

The second judgment which is relevant to address in this short appraisal is the *Schaefer Kalk* Case in which the Court of Justice annulled Article 49(1) of Regulation (EC) No 601/2012 on the monitoring and reporting of greenhouse gas emissions pursuant to the ETS Directive. As reported in previous appraisals, this is not the first time in which the Court of Justice annulled (part) of the acts of the Commission shaping the system envisaged by the ETS Directive. The *Borealis* and *Borealis II* cases both led to the annulment of Article 4 of, and Annex II to, Commission Decision 2013/448/EU due to a wrongful interpretation by the Commission of the concept of 'installations which are not covered by paragraph 3' under Article 10a(5) of the ETS Directive, as reported in JEEPL

1 Due to the length of the previous JEEPL issue, and the relatively modest relevance of the cases taken into consideration in the referred period, this appraisal has been kept short.

2 See Case C-254/14 *VG Vodoopskrba d.o.o. za vodoopskrbu i odvodnju* ECLI:EU:C:2014:2354.

2016/3–4 and 2017/1. The Commission redressed the error made under that Decision on the 25th of January 2017, by means of Commission Decision (EU) 2017/126.[3] In the *Schaefer Kalk* Case, it is the fact that the Commission manifestly misinterpreted the concept of 'emission' by covering also cases in which greenhouse gas emissions will not be released into the atmosphere, that led to the annulment of another piece of the implementing measures adopted by the Commission under the ETS Directive. It is disturbing to see that the Commission is having serious troubles in understanding some of the basic concepts of the ETS Directive. While, it is true that Article 10a(5) of the ETS Directive, at stake in the *Borealis* saga, was affected by inconsistency among the various official languages in which Decision 2013/448/EU was published, there is no-possible justification, grounded or not, as regards the misinterpretation of the concept of 'emission' under Article 3(b) of the ETS Directive. This negative track record of the Commission does not help increasing the confidence in a system which does not have a good reputation of its own.[4] It is to be hoped that the complexity of the system envisaged by the ETS Directive does not prove to be of a too big nature for the limited staff capacity of DG CLIMA.

3 Commission Decision (EU) 2017/126 of 24 January 2017 amending Decision 2013/448/EU as regards the establishment of a uniform cross-sectoral correction factor in accordance with Article 10a of Directive 2003/87/EC of the European Parliament and of the Council, OJ [2017] L 19/93.

4 For negative remark as regards the functioning of the ETS Directive see, among others, E. Woerdman (2015), 'The EU Greenhouse Gas Emissions Trading Scheme', in: E. Woerdman, M.M. Roggenkamp and J.M. Holwerda (eds.), Essential EU Climate Law, 2015 Cheltenham: Edward Elgar and some of the contributions in S.E. Weishaar (ed.), Research Handbook on Emissions Trading, 2016 Cheltenham: Edward Elgar.